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Constitutional Law--Trial by Jury--OSHA and the Seventh Amendment--Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission

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CASE NOTES

Constitutional Law–TRIAL BY JURY–OSHA AND THE SEVENTH AMENDMENT–*Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission,* 3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE (1974-1975 OSHD) ¶ 18,927 (3d Cir. Nov. 4, 1974), *vacated and rehearing en banc ordered,* 3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE 5939-13 (Dec. 20, 1974).

An employee of Frank Irey, Jr., Inc. (Irey) was killed when the trench in which he was working collapsed. As a result of this accident, Irey was cited for the violation of various standards promulgated pursuant to the Occupational Safety and Health Act of 1970[1] (the Act). At a hearing before an Occupational Safety and Health Administration (OSHA) examiner, Irey was found to have committed "willful" violations of the general duty section of the Act[2] and of certain standards relating to the proper shoring of trenches.[3] A penalty of $5000 was assessed. The Occupational Safety and Health Review Commission (the Commission) reviewed the case and affirmed the examiner's report.[4] Irey appealed the Commission's ruling to the United States Court of Appeals for the Third Circuit, challenging the constitutionality of various provisions of the Act. The Third Circuit Court of Appeals dismissed Irey's constitutional claims but remanded the Commission's ruling on the ground that the wrong standard had been applied in determining whether Irey's violations had been "willful" within the meaning of the Act. Judge Gibbons, dissenting, argued that the Act violated the seventh amendment by denying the opportunity for a jury trial. Acting on Irey's petition for a rehearing, a majority of the judges of the Third Circuit Court of Appeals vacated the judgment in the instant case and ordered a rehearing en banc.

I. OSHA AND ADMINISTRATIVE ADJUDICATION

A. OSHA

The Occupational Safety and Health Act of 1970 was enacted for the express purpose of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions"[5]

[1]29 U.S.C. §§ 651–78 (1975).

[2]The general duty section of the Act requires, in pertinent part, that:

(a) Each employer —

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards . . . .

29 U.S.C. § 654(a) (1975).

[3]Frank Irey, Jr., Inc., 1971–1973 OSHD 20,412 (1972).

[4]Frank Irey, Jr., Inc. 1973–1974 OSHD 21,282 (1973).

[5]29 U.S.C. § 651(b) (1975).

To achieve this goal the Act authorizes the Secretary of Labor to promulgate safety and health standards applicable to businesses affecting interstate commerce.[6] OSHA is the agency charged with the enforcement of these standards.

The Act provides for both civil and criminal penalties.[7] Although criminal sanctions can only be imposed following conviction in a court,[8] the Act provides that the Commission has authority to assess civil penalties "giving due consideration to the appropriateness of the penalty with respect to the size of the business . . . the gravity of the violation, the good faith of the employer, and the history of previous violations."[9]

Penalties assessed under the Act are to be paid to the Treasury of the United States[10] and if not voluntarily paid may be recovered by the United States in a civil action brought in a district court.[11] While the Act is not clear on this point, the legislative history and accepted judicial interpretation indicate that the district court proceeding for the collection of OSHA penalties is to be a summary proceeding at which the merits of the penalty imposition are not explored.[12]

B. Administrative Proceedings, Civil Penalties, and a Seventh Amendment Right to a Jury Trial

Federal courts have generally rejected claims of a right to jury trial in federal administrative proceedings. In *Helvering v. Mitchell*[13] the Supreme Court rejected the argument that a civil fraud provision of the Internal Revenue Act was in the nature of a criminal sanction. Concluding that the jury trial guarantee of article III, section 2 of the Constitution was therefore inapplicable, Justice Brandeis explained that "the determination of the facts upon which liability is based may be by an administrative agency instead of a jury . . . ."[14]

The second case of note is *NLRB v. Jones & Laughlin Steel Corp.*[15] In that case the Court ordered enforcement of an NLRB decree requiring the reinstatement of an employee and an award of back pay. Jones & Laughlin argued that it was entitled to a jury trial as the award of back pay was the equivalent of a money judgment and was therefore subject to the seventh amendment. The Supreme Court rejected this claim and held that where an award of monetary

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[6]*Id.* § 651(b) (3).

[7]*Id.* § 666.

[8]*Id.* § 666(e), (f), (g).

[9]*Id.* § 666(i).

[10]*Id.* § 666(k).

[11]*Id.*

[12]In the House debate it was stated that this provision should be narrowly construed and was intended to be limited to any process which might be necessary to actually collect the penalty. 116 CONG. REC. 42207 (1970).

[13]303 U.S. 391 (1938).

[14]*Id.* at 402.

[15]301 U.S. 1 (1937).

relief is merely incidental to an equitable remedy, the proceeding need not be tried to a jury.[16] That holding has been broadly construed as meaning that administrative proceedings, in general, need not comply with the seventh amendment.[17]

II. JUDGE GIBBONS' DISSENT IN THE INSTANT CASE

Although the Third Circuit Court of Appeals remanded the instant case for the Commission's reconsideration of the "willfulness" issue,[18] it did consider and reject all of Irey's constitutional complaints.[19] Judge Gibbons' dissent,[20] however, addressed an issue not raised by Irey. The burden of the dissent is that the Act violates the seventh amendment[21] because an alleged violator is denied the opportunity for a jury trial determination of the facts upon which a money judgment is assessed.[22]

Characterizing the proceeding in the instant case as a suit for an in personam money judgment, an action at law, the dissent asserted that the Supreme Court has never sustained the imposition of such a judgment where a defendant requested and was denied his seventh amendment right to a jury trial.[23] In reaching this conclusion, Judge Gibbons dismissed the government's reliance on *Helvering v. Mitchell*. Specifically, Judge Gibbons asserted that Justice Brandeis' language was not dispositive of the jury trial issue in the instant case as *Mitchell* dealt only with the right to trial by jury in *criminal* proceedings secured by article III, section 2 of the Constitution and not the seventh amendment guarantee of jury trial in civil cases.[24]

The dissent also considered several other cases that might be construed as authority for the denial of Irey's seventh amendment right.[25] Of particular importance is Judge Gibbons' treatment of

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[16]*Id.* at 48.

[17]*See, e.g.*, Justice Marshall's characterization of *Jones & Laughlin* in Curtis v. Loether, 415 U.S. 189, 194 (1974). This characterization of *Jones & Laughlin* is discussed in the text accompanying notes 55–61 *infra*.

[18]3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE (1974–1975 OSHD) ¶ 18,927, at 22,730.

[19]*Id.* at 22, 726–27.

[20]*Id.* at 22, 731.

[21]U.S. CONST. amend. VII provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

[22]3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE (1974–1975 OSHD) ¶ 18,927, at 22,731–35.

[23]*Id.* at 22,735.

[24]*Id.* at 22,734.

[25]The cases considered by Judge Gibbons included those arising under passenger safety and immigration laws. Judge Gibbons dismissed the precedential value of these cases on the ground that they all had dealt with in rem procedures and hence were not analogous to the in personam procedure in question in the instant case. *Id.* at 22,732–35. This in rem-in personam dichotomy is discussed in the text accompanying notes 44–47 *infra*.

NLRB v. Jones & Laughlin Steel Corp. The rule espoused by the Supreme Court in that case is that where an award of monetary relief is merely incidental to an equitable remedy, the proceeding is not in the nature of an action at common law and hence the seventh amendment is inapplicable.[26] Noting that the only relief sought in the instant case was the recovery of a money judgment with no equitable sanctions involved, the dissent concluded that *Jones & Laughlin* was not controlling.[27]

In concluding his analysis, Judge Gibbons cited with approval another administrative scheme that avoided the seventh amendment problem,[28] and noted that OSHA could easily provide similar safeguards.[29] Citing *Ross v. Bernhard*,[30] a case in which the seventh amendment was found applicable to stockholder derivative suits, as indicative of the result he would reach, Judge Gibbons concluded that "[i]n the absence of a case in point in the Supreme Court, I prefer to assume that the seventh amendment still has meaning." [31]

III. Analysis of Judge Gibbons' Dissent

Judge Gibbons' dissent is important for several reasons. First, in the instant case, the Third Circuit Court of Appeals has granted an en banc rehearing of the case largely to consider the seventh amendment issue.[32] Second, similar complaints concerning OSHA's enforcement powers have been raised in other circuits.[33] Third, the same constitutional question is inherent in several other administrative schemes. [34] Finally, the dissent identifies a constitutional basis upon which to limit the adjudicatory powers exercised by administrative agencies. Judge Gibbons' dissent is thorough and seemingly compels the result urged. There are, however, several points that merit closer scrutiny. For these reasons, this case note is limited to an analysis of possible weaknesses in Judge Gibbons' dissent.

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[26]301 U.S. at 48.

[27]3 CCH Employment Safety & Health Guide (1974–1975 OSHD) ¶ 18,927, at 22,735.

[28]Judge Gibbons quotes L. Jaffee, Judicial Control of Administrative Action 113 (Student ed. 1965), wherein Professor Jaffee extols the virtues of the administrative scheme created by the Federal Communications Act, 47 U.S.C. §§ 503–04 (1970). 3 CCH Employment Safety & Health Guide (1974–1975 OSHD) ¶ 18,927, at 22,736. The majority in the instant case also expressed similar reservations about OSHA's administrative scheme, indicating that while they found the Act constitutional, a less offensive means of administrative adjudication could have been devised. *Id.* at 22,729 n.11.

[29]3 CCH Employment Safety & Health Guide (1974–1975 OSHD) ¶ 18,927, at 22,736.

[30]396 U.S. 531 (1970).

[31]3 CCH Employment Safety & Health Guide (1974–1975 OSHD) ¶ 18,927, at 22,735.

[32]For the purposes of the rehearing, the Third Circuit Court of Appeals requested that both parties prepare briefs directed to the seventh amendment issue. Letter from McNeill Stokes (attorney for Irey) to Roy K. Ross, March 26, 1975.

[33]Constitutional challenges to OSHA's powers have already been raised in the Courts of Appeals for the Fourth, Fifth, and Eighth Circuits. Petitioner's Brief for Rehearing at 13, Frank Irey, Jr., Inc. v. OSHRC, 3 CCH Employment Safety & Health Guide (1974–1975 OSHD) ¶ 18,927 (3d Cir. Nov. 4, 1974).

[34]*See* 2 Recommendations and Reports of the Administrative Conference of the United States 948–52 (1972) (Appendix A).

A. An "Action for Debt"

By its terms, the seventh amendment applies to "suits at common law." The term "common law" is generally interpreted as meaning the common law of England as of 1791, the date the amendment was adopted.[35] This interpretation does not, however, necessarily preclude the application of the seventh amendment to newly created rights;[36] the fact that OSHA did not exist in 1791 does not of itself defeat the seventh amendment claim arising out of the Act's enforcement procedure. However, the claim to a jury trial will prevail, under accepted seventh amendment analysis, only if the newly created rights and duties under the Act are closely analogous to those rights and duties which were historically enforceable in an action at common law.[37]

On this point, Judge Gibbons' characterization of the district court proceeding provided for by OSHA as one for execution on an in personam money *judgment* is misleading. Taken literally, such a characterization would undermine Judge Gibbons' position that a de novo jury trial on the merits of the penalty award should be available in the district court proceeding. Technically, a suit for execution on an in personam money judgment, though subject to the seventh amendment, is limited in scope to a consideration of the existence and validity of the judgment. The merits upon which that judgment was secured are not open to review by the jury.[38]

Judge Gibbons' seventh amendment argument would be strengthened by characterizing the Act's collection procedure not as a proceeding for execution on an in personam money judgment but rather as an action to collect a civil penalty. An action to collect such a penalty is equivalent to the old common law "action for debt" which was triable before a jury.[39] And "when a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an *action for debt* still prevails whatever modern name may be applied to the action."[40]

Yet the near identity of the Act's mode of penalty recovery with the common law action for debt does not necessarily end seventh amendment analysis. There is some authority to the effect that the seventh amendment does not apply to *administrative proceedings* in general.[41] Seemingly anticipating the difficulty this authority may

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[35]Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830).

[36]*See* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.11[7] (2d ed. 1974) [hereinafter cited as 5 MOORE].

[37]*Id.* at 128.4.

[38]Milwaukee County v. M. E. White Co., 296 U.S. 268, 275 (1935).

[39]*See* 5 MOORE ¶ 38.11[7], at 128.2. An action for debt covers, among other causes, suits for statutory penalties. See, in addition, Hepner v. United States, 213 U.S. 103 (1909) for Mr. Justice Harlan's treatment of the subject.

[40]United States v. Jepson, 90 F. Supp. 983, 986 (D.N.J. 1950) (emphasis added).

[41]*See* text accompanying notes 13–17 *supra* and notes 55–61 *infra*.

present to a jury trial claim, Judge Gibbons attempted to distinguish the instant case from *Helvering v. Mitchell*[42] and *NLRB v. Jones & Laughlin Steel Corp.*[43]

B. Helvering v. Mitchell

Judge Gibbons' rejection of *Mitchell's* precedential value was based on his conclusion that Justice Brandeis' language in that case had reference only to jury trial claims arising under article III, section 2 of the Constitution. A primary ground upon which Judge Gibbons based this conclusion was that all cases cited to support Justice Brandeis' rejection of the jury trial claim dealt with penalties for forfeitures assessed in rem.[44]

Yet in rem cases *may* be appropriate precedent in a case dealing with seventh amendment claims. In general terms, the seventh amendment right to a trial by jury in civil cases is applicable to all in personam actions. It applies also to all in rem proceedings except those arising under admiralty or maritime jurisdictions.[45] Accordingly, cases denying a jury trial for nonmaritime proceedings in rem would be persuasive precedent for a like ruling in an in personam context. Judge Gibbons' blanket rejection of cases dealing with in rem proceedings overstates the in rem- in personam dichotomy.

Although Judge Gibbons' sweeping rejection of in rem precedent is questionable, analysis of the cases cited in *Mitchell*[46] reveals that rejection of those particular in rem precedents was, in fact, appropriate. All those cases arose under admiralty or maritime jurisdiction, as defined by the Judiciary Act of 1789,[47] and consequently the seventh amendment was not applicable to them. Obviously, this fact serves to bolster the conclusion that *Mitchell's* language was not directed to seventh amendment claims.

There is one additional distinction between *Mitchell* and the instant case, not noted by the dissent. The Constitution expressly delegates to Congress powers to legislate in the areas dealt with in *Mitchell* and the cases cited in support thereof. The areas involved include internal revenue, alien immigration, and customs assessment.[48] Traditionally, judicial deference to congressionally prescribed

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[42]303 U.S. 391 (1938).

[43]301 U.S. 1 (1937).

[44]3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE (1974–1975 OSHD) ¶ 18,927, at 22,734.

[45]*See* 5 MOORE ¶ 38.35 [1], at 269–70.

[46]Footnote 7 to Justice Brandeis' opinion reads, in pertinent part:

> *Passavant v. United States,* 148 U.S. 214; *Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320; *Elting v. North German Lloyd,* 287 U.S. 324, 327–28; *Lloyd Sabaudo Societa v. Elting,* 287 U.S. 329, 334.

303 U.S. at 402 n.7.

[47]*Passavant v. United States* involved a dispute over import customs assessment. *Oceanic Steam Navigation Co. v. Stranahan, Elting v. North German Lloyd,* and *Lloyd Sabaudo Societa v. Elting* all dealt with fines levied in rem against ships involved in the importation of aliens. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76.

[48]*See* note 47 *supra.* Congress is given authority to raise internal revenue in U.S. CONST. art. I, § 8, cl. 1 and by the sixteenth amendment. Control over immigration is

administrative procedures is greatest where the area of legislation is exclusively within congressional control.[49] This factor suggests a limit to the dictum in *Mitchell.*

Examining OSHA in this light, one finds that while Congress enacted OSHA pursuant to, or in exercise of, constitutionally delegated powers,[50] occupational safety is certainly not a concern expressly delegated to Congress by the Constitution, nor is it an area over which Congress has exclusive control.[51] These two factors clearly distinguish occupational safety from the agencies and laws dealt with in *Mitchell* and the cases upon which it relies.

In sum, Judge Gibbons' rejection of *Mitchell* as being dispositive of Irey's seventh amendment claim in the instant case seems compelling on two grounds. First, Justice Brandeis' language is mere dictum and not addressed to a seventh amendment challenge. Second, the cases upon which *Mitchell* relied all dealt with areas of legislation over which the courts traditionally give Congress great deference.

C. NLRB v. Jones & Laughlin Steel Corp.

In the instant case, the dissent narrowly confined the reach of *Jones & Laughlin* to its explicit holding that where an award of monetary relief is only incidental to an equitable remedy the seventh amendment is inapplicable.[52] Distinguishing *Jones & Laughlin* from the instant case, Judge Gibbons noted that no equitable sanctions are involved in the OSHA proceedings.[53]

While this reading of *Jones & Laughlin* has been adopted by some of the commentators,[54] a broader reading of the case is possible. In dictum, the Supreme Court gave a broad reading to *Jones & Laughlin* in the recent case of *Curtis v. Loether.*[55] Justice Marshall, writing for

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based on art. I, § 8, cl. 4. The power over customs assessment is predicated on art. I, § 8, cl. 1, 3.

[49]Speaking for the Court in *Oceanic Steam Navigation Co. v. Stranahan,* Mr. Justice White said:

> In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, *when legislating as to matters exclusively within its control,* to impose appropriate obligations . . . without the necessity of invoking the judicial power.

214 U.S. at 339 (emphasis added). See the language immediately following that quoted, wherein Justice White explains the rationale behind the constitutional principle. *Id.* at 339–40.

[50]The Act is predicated on the Commerce Clause and the congressional power to provide for the general welfare. 29 U.S.C. § 651(b)(1975).

[51]The Act takes note of this fact by providing for the interrelationship of state and federal regulation. *Id.* at § 667. Beyond this, however, occupational safety is of course governed and encouraged by the tort law and workmen's compensation statutes that exist in every state.

[52]3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE (1974–1975 OSHD) ¶ 18,927, at 22,735.

[53]*Id.*

[54]*See, e.g.,* 5 MOORE ¶ 38.08 [5], at 81–82.

[55]415 U.S. 189 (1974).

the Court, asserted that *Jones & Laughlin* stands for the proposition that "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme."[56]

Even accepting this broad characterization of *Jones & Laughlin*, to grant Irey, and those similarly situated, recourse to a de novo jury trial on the merits when sued for an OSHA penalty would not be "incompatible with the whole concept of administrative adjudication." In order to comply with seventh amendment requirements, OSHA could make a formal, though legally inconclusive, adjudication of liability. An action to recover a penalty so ascertained could proceed as currently designed, but with a de novo jury trial on the merits available to the defendant. Administrative adjudication would still exist with only the finality of such judgments impaired. Such a procedure has proven effective for the Federal Communications Commission (FCC).[57] This fact tends to refute any "incompatible with the whole concept of administrative adjudication" argument.

Similarly, compliance with the seventh amendment would not "substantially interfere with [OSHA's] role in the statutory scheme." The Act provides OSHA with essentially three roles: a quasi-legislative role,[58] an administrative-enforcement role,[59] and an adjudicatory role.[60] Of these three roles, only the third mentioned would be affected by allowing for a jury review of the merits upon which an OSHA penalty is based. Moreover, the interference with OSHA's adjudicatory role would not be severe; it would impair the finality of OSHA decisions only by allowing for what is essentially an optional appeal to the courts.[61] Further, the FCC's experience indicates that such an option is seldom exercised.[62] This interference is further minimized by the express holding of *Jones & Laughlin* that equitable remedies may be imposed administratively without resort to the judiciary.[63]

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[56]*Id.* at 194 (footnote omitted).

[57]*See* note 28 *supra.*

[58]29 U.S.C. § 655 (1975) (authorization to promulgate safety and health standards).

[59]*Id.* at §§ 657–59 (authorization to inspect, investigate complaints, issue citations, etc.).

[60]*Id.* at §§ 659–62 (adjudication by the Commission authorized).

[61]The procedure postulated here would entail a de novo jury trial only when a defendant does not voluntarily pay the OSHA determined penalty. Under the Federal Communications Act, the Government has never been put to such a suit in order to collect a penalty. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 113 (Student ed. 1965).

[62]*Id.* On this point, the majority in Irey observed:

> [W]e think experience demonstrates rather conclusively that in cases of this nature *de novo* review is seldom requested. [Yet] it is the *availability of the remedy, not its infrequent utilization* which is important to the cause of justice.

3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE (1974–1975 OSHD) ¶ 18,927, at 22,729 n.11 (emphasis added).

[63]301 U.S. at 48.

Manifestly then, *Jones & Laughlin* does not control the seventh amendment claim arising under the OSHA procedure in question. If that case is given a narrow reading, Judge Gibbons' distinction is conclusive. Even the expansive test implicit in Justice Marshall's characterization of *Jones & Laughlin* would not mandate a denial of a seventh amendment claim. And, certainly, *Jones & Laughlin* cannot support a holding that all administrative proceedings, including the OSHA enforcement procedure, are outside the scope of the seventh amendment.

IV. Conclusion

Subject to the foregoing clarifications and expansions, Judge Gibbons' position clearly represents the current state of the law and the best thinking. Accordingly, on rehearing, the Third Circuit Court of Appeals will be forced to deal with Judge Gibbons' conclusion with a more sophisticated analysis than was employed by the majority in the instant opinion. Hopefully, the Third Circuit Court of Appeals will shun the questionable judicial technique employed by the majority in *Irey* when that panel anticipated the Supreme Court, relying on no more than the "thrust" of certain precedents,[64] and refused to vindicate a fundamental right. Paraphrasing Judge Gibbons, in the absence of a case in point in the Supreme Court, it is preferable to assume that the seventh amendment still has meaning.[65]

Criminal Procedure–Discovery–Pretrial Discovery Deposition in Utah Criminal Proceedings–*State v. Nielsen*, 522 P.2d 1366 (Utah 1974).

The defendant, a Logan, Utah, city commissioner, was charged with misuse of public funds, a felony, and with a misdemeanor count of using his position to secure privileges or exemptions. Four days later he served seven Logan citizens with notice that their depositions would be taken pursuant to the Utah Rules of Civil Procedure. The prospective witnesses were also served with subpoenas duces tecum calling for the production of certain documents relating to the criminal charges. In response, the state quickly brought an action for a declaratory judgment to determine the defendant's right to take the depositions. The district court issued an order permanently stay-

[64] 3 CCH Employment Safety & Health Guide (1974–1975 OSHD) ¶ 18,927, at 22,729 n.11.

[65] *Id.* at 22,735.